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No. 06-595

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In The
Supreme Court of the United States

TYLER CHASE HARPER, KELSIE J. HARPER, ET AL.,

Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' RESPONSE TO RESPONDENTS' SUGGESTION OF MOOTNESS

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INTRODUCTION

Kelsie Harper still faces daily violations of her First Amendment rights that warrant injunctive relief. Ms. Harper is currently a junior at the Poway Unified School District High School ("School"). Petition for Writ of Certiorari at 3.[1] Ms. Harper is being subjected to serious, irreparable harm to her First Amendment freedoms every day she is in school and restricted by the School's broad policy prohibiting all negative, derogatory, and demeaning speech. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Relief is needed now because she will graduate in June of 2008 – effectively ending her one time opportunity for exercising her free speech rights while in high school. The District Court's denial of preliminary injunction, and the Ninth Circuit Court of Appeals' affirmance thereof, is still at issue.

Even if this case were mooted by the District Court's ruling on the merits, the "established practice" is to reverse or vacate the ruling, not deny the petition. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Thus, if this Court determines the District Court's order dismissing the case moots this petition, the judgment of the court of appeals must be vacated, and the matter remanded with directions to vacate the district court's initial ruling on preliminary injunction.

I. This Appeal Is Not Moot Because Kelsie Harper Is Still a Student At Poway High School.

Kelsie will only be in high school once, and even though she is seeking damages, no amount of money can ever compensate her for the restriction of First Amendment rights she is now experiencing. This is exactly the situation the appeal of interlocutory orders is designed to

[1] Respondents have already conceded to Kelsie's intervention in the petition for writ of certiorari. Respondents' Brief in Opposition at 26.

remedy. 28 U.S.C. § 1292(a)(1) permits "litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981).

A. Petitioners have the right to seek review of the Ninth Circuit's opinion, which is now law of the case.

As it stands, the Ninth Circuit's 2-1 opinion affirming the denial of preliminary injunction serves as law of the case. 18B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.5 (2d ed. 2006) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal").

The District Court held that it was bound by the opinion that the Petitioners are asking this Court to review. Accordingly, its recent order awarding summary judgment to the School was largely dictated by the Ninth Circuit's ruling on preliminary injunction. Suggestion of Mootness at 4. The Ninth Circuit will also be bound by its previous rulings when it considers the district court's award of summary judgment to the School on appeal. *See* Wright & Miller at § 4478.5.

If this petition is mooted simply because the District Court entered a final order in the matter, Ms. Harper will effectively be deprived of the opportunity to take advantage of her right to ask this Court to hear the issue of preliminary injunction, and the appellate court ruling that is now governing the case. This is bootstrapping at its worst, and is clearly not the law, as demonstrated below.

B. This petition is not moot because an award of preliminary injunction will still affect the rights of the parties.

This petition regarding the denial of preliminary injunction is not moot because the Petitioner is still in a position to obtain some benefit if this Court reverses the lower courts' preliminary injunction rulings. Similarly, a preliminary injunction appeal was not moot, despite the district court's ruling on the merits while the appeal was pending in *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1998). There, the plaintiffs sought breach of contract damages, and a preliminary injunction prohibiting the defendant from transferring assets while the case was pending. *Id.* at 312. The district court granted the injunction and the Second Circuit affirmed to avoid the prospect of plaintiffs being unable to collect on any judgment they may have obtained. *Id.* at 312-13.

But while the ruling on preliminary injunction was pending on appeal, the matter proceeded below and the district court ordered summary judgment for the plaintiffs. *Id.* This Court then granted certiorari and, like the School in this case, the respondents argued that any claim regarding the issuance of the preliminary injunction was moot because it had merged with the district court's final order granting summary judgment to respondents. *Id.* at 313.

This Court recognized that "***[g]enerally***, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter." *Id.* at 314 (emphasis added). The rationale underlying this general rule is simple when the court enters a permanent injunction after ordering a preliminary one: "The final injunction establishes that the defendant should not have been engaging in the conduct that was enjoined. Hence, it is reasonable to regard the preliminary injunction as merging into the final one. . . ." *Id.* at 315.

But this Court then held in *Grupo* that there is an exception to the general rule when a ruling on preliminary injunction would still affect the rights of the parties. A unanimous Court determined the preliminary injunction was not moot because a bond was required, and if the preliminary injunction was wrongly issued, the petitioners would still have a right to recover on that bond. *Id.* at 315, 335 n.2 (Justices Ginsburg, Stevens, Souter, and Breyer, dissented, but joined in this portion of the majority opinion).

Likewise, if the Harpers' preliminary injunction was wrongly denied, Kelsie's constitutional rights can still be protected because she is still in school. A preliminary injunction will serve to protect her rights so the matter is not moot.

This conclusion is supported by *Grupo's* analysis of *University of Texas v. Camenisch*, 451 U.S. 390 (1981), where the district court entered a preliminary injunction requiring the university to provide an interpreter for a deaf student. The university appealed, but while the appeal was pending, the student graduated, thus mooting the need for preliminary relief. The preliminary injunction order would therefore merge into the district court's final order because the student had graduated. *Grupo*, 527 U.S. at 316-17. Since Kelsie Harper has ***not*** graduated, no merger occurs and the motion for preliminary injunction is still at issue.

So the primary case relied upon by Respondents in support of their Suggestion of Mootness actually demonstrates that Kelsie's petition for writ of certiorari is not moot. The other cases Respondents cite do not hold to the contrary, primarily because none of them address a deprivation of First Amendment rights that cannot be remedied by damages.

Smith v. Illinois Bell Telephone Co., 270 U.S. 587 (1926), considered an appeal from the lower court's entry of an "interlocutory" order enjoining a commission from prohibiting the phone company from charging higher

rates. The district court later entered a permanent injunction giving the phone company the same relief. Applying the general rule referenced above, this Court dismissed the appeal of the interlocutory order granting temporary relief, because the same relief was later permanently given to respondents. Unlike Kelsie's situation where a preliminary injunction will serve to protect her free speech rights because she is still in school and the illegal conduct is ongoing, there was no longer any need to rule on the interlocutory relief because the court had entered a permanent injunction granting all the relief requested.

Pacific Tel. Co. v. Kuykendall, 265 U.S. 196 (1924), also involved a commission's failure to allow a phone company to raise its rates. The phone company appealed the denial of a temporary injunction directly to this Court. *Id.* at 198. While the appeal was pending, the lower court dismissed the case and the phone company appealed that order to this Court as well. *Id.* There was no need for preliminary injunctive relief because any harm the phone company endured from an inability to raise rates could be remedied by money damages.

The same is true in *Shaffer v. Carter*, 252 U.S. 37 (1920), where a resident of Chicago sued state authorities in Oklahoma for taxing his business interests in that state. He sought a "temporary" injunction, which was denied, and then he appealed the denial. *Id.* at 43. Later, he appealed the lower court's final dismissal of his claim. *Id.* This Court also applied the general rule in that case and dismissed the appeal of the denial of the temporary injunction. Once again, any damages resulting to the petitioner from taxation of his property could simply be remedied through money.

Smith, Shaffer, and *Pacific Telephone* are not controlling here because those cases all involved harm that could be remedied by an eventual order requiring defendants to pay damages. That is not true of Kelsie Harper's conundrum. No amount of money, or even permanent injunctive relief, will ever be able to fully compensate her for the loss

of her free speech rights. The only possible way to preserve her constitutional rights is to grant her request for an injunction while she is still in school. This case is more akin to *Liner v. Jafco, Inc.*, 375 U.S. 301, 303-04 (1964), where an appeal of a state court ex parte injunction prohibiting labor picketing of a construction site was not moot, even though construction was completed. The union's desire to engage in similar speech against other construction sites in the future, *id.* at 307, n.5, supplied the irreparable harm that kept the issue of injunctive relief from becoming moot.

This Court should allow the petition for writ of certiorari to proceed under *Grupo* because a ruling on preliminary injunction will still affect the rights of the parties. Moreover, it is the only way Kelsie will be able to avoid the irreparable harm to free speech rights that is now occurring every school day.

II. If This Appeal Is Moot, the Lower Courts' Decisions Should Be Vacated.

Should this Court determine that Petitioners' request for preliminary injunction is moot, the proper ruling is to vacate the lower court opinions on the matter, not simply deny the writ of certiorari. Under 28 U.S.C. § 2106, this Court has the authority to vacate any judgment brought before it for review, and may remand the case and direct the entry of any judgment "as may be just under the circumstances."

When a civil case from a federal court has become moot while on its way to, or pending before, this Court, the "established practice" is to reverse or vacate the judgment and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Indeed, this course of action "has been followed in countless cases in this Court." *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92 (1979).

Vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. Vacatur of the court of appeals' judgment is particularly appropriate in this case if this appeal is moot, because Kelsie Harper will be left with no way to appeal a court of appeals decision that is now law of the case. Accordingly, the judgment of the court of appeals should be vacated and the case remanded to that court with directions to order the vacation of the district court's judgment on the motion for preliminary injunction as moot. *See Anderson v. Green*, 513 U.S. 557, 560 (1995) (per curiam) (ordering that disposition of a moot case).

A. Vacatur is necessary whenever the appellant does not intentionally moot the case.

Determining whether vacatur is appropriate is an equitable question, and the primary factor is the fault of the parties in causing the appeal to become moot. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25-26 (1994). If the party seeking relief does not intentionally cause the mootness, vacatur is appropriate. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *Id.* at 25.

Vacatur is appropriate here because the district court's ruling on the merits was the normal culmination of the litigation process; it was not a deliberate effort to escape the consequences of the decision below.

B. Vacatur is also necessary to prevent an unreviewable decision from acting as law of the case in future proceedings in this matter.

While the appeal of the preliminary injunction was pending, this case continued to move forward in the District Court, and is now on appeal before the Ninth Circuit Court of Appeals. This fact tilts the equities even further in favor of vacatur. As demonstrated by the District Court's order on summary judgment, the Ninth Circuit's affirmance of the denial of preliminary injunction is now law of the case and governs the proceedings at the district court and on appeal. *See Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993) ("As to decisions of law, the interlocutory appeal will establish law of the case"); 18B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478.5 (2d ed. 2006) ("A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal"). Thus, the risk of harm from an unreviewable decision is compounded.

Vacatur is the only way to ensure that the rights of all parties are preserved and that no one will be prejudiced by a decision that could not be reviewed. *Munsingwear*, 340 U.S. at 40. It will remove the effect of the lower courts' rulings on the request for a preliminary injunction, and the case will still be litigated and ruled upon – this time with a complete record – on the parties' cross-motions for summary judgment. As such, the equities strongly favor vacating the lower courts' decisions.

This Court has, on at least two occasions, vacated the judgment of the Court of Appeals on a motion for preliminary injunction because the motion – but not the underlying case – had become moot. *See University of Texas v. Camenisch*, 451 U.S. at 394 (preliminary injunction moot because student graduated); *Honig v. Students of California School for the Blind*, 471 U.S. 148, 149-50 (1985) (preliminary injunction requiring testing was moot because testing was complete and "[n]o order of this Court could affect the parties' rights with respect to the injunction"). And this is commonly done in the courts of appeals. *See, e.g., NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir. 1999); *Knaust v. City of Kingston*, 157 F.3d 86, 89-90 (2d Cir. 1998); *Animal Legal Defense Fund v. Shalala*, 53 F.3d 363 (D.C. Cir. 1995); *Ethredge v. Hail*, 996 F.2d 1173 (11th Cir. 1993); *Fauconniere Mfg. Corp. v. Secretary of Defense*, 794 F.2d 350 (8th Cir. 1986). Accordingly, vacatur is also appropriate in this case.

CONCLUSION

Given Ms. Harper's continued status as a student at Poway High School, her request for a preliminary injunction is not moot even though summary judgment has been awarded against her. "A final order dismissing the action or purporting to settle the matter does not make the appeal from a preliminary order moot. In fact, if it is determined on appeal that interlocutory relief should be granted, this will render the dismissal order moot and compel the lower court to consider granting final relief." 5 Am. Jur. 2d *Appellate Review* § 656 (2006).

Even if this Court agrees with Respondents and determines the petition is moot, it should not be denied. This Court should grant the petition for purposes of vacating the judgment of the United States Court of

Appeals for the Ninth Circuit and remand the case to that court with directions to order the vacation of the judgment of the district court with respect to the motion for preliminary injunction.

Respectfully submitted this
20th day of February, 2007,

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